

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,  
AND IRBESARTAN PRODUCTS  
LIABILITY LITIGATION**

**This Document Relates to All Actions**

MDL No. 2875

Honorable Robert B. Kugler,  
District Court Judge

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants submit this Notice of Supplemental Authority concerning Plaintiffs' Motion for Class Certification (ECF No. [1747](#)), and Defendants' opposition to the same (ECF No. [2008](#)).

The United States Court of Appeals for the Fifth Circuit recently issued a decision in *Earl v. Boeing*, No. 21-40720, 2022 WL 17088680 (5th Cir. Nov. 21, 2022), decertifying a class of consumers and holding that the case must be dismissed for lack of Article III standing, which the court recognized as “an inherent prerequisite to the class certification inquiry.” *Id.* at \*2 (internal quotations omitted). *Earl* is instructive because the theory of economic injury at issue was strikingly similar to the one advanced by Plaintiffs here.

The plaintiffs in *Earl* alleged the defendants fraudulently concealed defects in the Boeing 737 MAX 8 aircraft, thereby placing passengers at risk of serious injury or death. *Id.* at \*3. The FAA issued an emergency order grounding the MAX 8 after

two fatal crashes, but not before thousands of consumers purchased tickets and completed trips on the aircraft. *Id.* at \*2. The plaintiffs in *Earl*—none of whom were involved in a crash or otherwise suffered physical injuries—alleged they endured economic harm “because the ticket prices they paid ‘were significantly higher than the value of those tickets, which for many, if not most, passengers was zero.’” *Id.* at \*3. The plaintiffs in *Earl* maintained they would have never flown on a MAX 8 aircraft had they been aware of the concealed defects and, therefore, the tickets they had purchased before FAA grounded the MAX 8 fleet were economically worthless.

The Fifth Circuit, relying on recent Supreme Court decisions in *TransUnion LLC v. Ramirez*, — U.S. —, 141 S. Ct. 2190 (2021) and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), rejected plaintiffs’ theory of standing and economic harm. The court found that the plaintiffs failed to “plausibly allege[] that they’re any worse off financially” as a result of defendants’ alleged conduct. Rather, the court determined plaintiffs likely *benefited* from the availability of the MAX 8 because, had the MAX 8 fleet been grounded sooner, plaintiffs “would have had to take different, more expensive (or otherwise less desirable) flights instead.” *Id.* at \*4.

Here, Plaintiffs have advanced the exact same “zero value” theory of economic injury to support class certification that was rejected by the Fifth Circuit in *Earl*. Plaintiffs seek to recover the purchase price of their valsartan-containing drugs (“VCDs”) because of the potential presence of nitrosamine impurities, which

purportedly rendered the medication “illegal” to sell and therefore “worthless.” Like the passengers in *Earl* who arrived safely at their destinations despite the defects in the MAX 8 that prompted FAA to ground the entire fleet, Plaintiffs here have admitted the VCDs they purchased were efficacious in controlling their hypertension without causing any untoward side effects. Moreover, just as the plaintiffs in *Earl* benefited from the availability of the MAX 8 aircraft to drive down ticket prices, Plaintiffs reaped the reward of competition among manufacturers of generic VCDs and, in any event, would have still been required to purchase medication to control their hypertension even if Defendants’ VCDs were no longer on the market. These facts, which require an individualized inquiry with respect to each putative class member, demonstrate that Plaintiffs’ proffered theory of economic injury is fundamentally flawed and should be rejected.

Dated: December 5, 2022

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 5, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants in this matter.

/s/ Clem C. Trischler

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